

## - - - ASSIGNMENTS - - -

(Guidance provided by the Board Order entitled *In the Matter of the Petition of Lake Publishing Company*, Order: WQ 2000-06-UST<sup>1</sup>)

Below is a discussion on the assignment of rights to reimbursement from the Underground Storage Tank Cleanup Fund (Fund), including terms, rights, and restrictions. Attached is a document with sample assignment provisions, which may also be used for guidance.

The Division of Financial Assistance has traditionally not allowed a claimant to assign its rights to reimbursement from the Fund. However, in light of strong policy in California law favoring the assignment of rights and interests in property, in April of 2000, the State Water Resources Control Board (Board) adopted the *Lake* Order. The *Lake* order allows, under certain circumstances, the Fund to honor a claimant's assignment of its rights to reimbursement from the Fund. In many respects, an assignment is very similar to the Fund's long-established practice of permitting "on behalf of" agreements. These "on behalf agreements" are discussed in earlier Board orders, *Quaker State* and *Hollis Rodgers*.<sup>2</sup>

**TERMS:** "Assignor" -- a party who is eligible to apply to the Fund, or who is already a claimant to the Fund.

"Assignee" -- usually a party who is not eligible to file its own claim to the Fund, but is not ineligible because of its own conduct/misconduct at the site.

The *Lake* decision, at page 19, provides the following:.

- The Assignee of a Fund claim must demonstrate the priority and eligibility of the Assignor if no previous claim has been filed with the Fund.
- Offsets that would otherwise diminish the Assignor's reimbursement (e.g. insurance and settlement proceeds) will similarly reduce the amount reimbursed to the Assignee.
- Any fraud or misrepresentation on the part of the Assignor or the Assignee will render the claim ineligible for participation in the Fund and potentially subject the Assignor *and* Assignee to legal action.
- Fund staff treat an assignment as an "on behalf of" agreement, but the process will be streamlined (from the claimant/Assignor and Assignee's perspectives) because the

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<sup>1</sup> The Board decision, *In the Matter of Lake Publishing Company*, Order: WQ 2000-06-UST, can be accessed on the Internet through [www.swrcb.ca.gov](http://www.swrcb.ca.gov) (Board Business, 2000 Resolutions/Orders/Decisions, Water Quality Orders, sixth item.)

<sup>2</sup> *In the Matter of Quaker State Corporation*, Order WQ 97-06-UST; *In the Matter of Hollis Rodgers et al.*, Order WQ 99-02-UST.

Assignee will be able to proceed without relying on the intermediate submission of documents to the claimant for submission to the Fund. In other words, the Assignee “steps into the shoes” of the claimant/Assignor and does not need the claimant/Assignor’s signature on any of the documents submitted to the Fund.

## **ASSIGNEE’S RIGHTS UNDER AN ASSIGNMENT**

The Fund will accept an assignment that is consistent with the Board’s decisions in *Quaker State*, *Hollis Rodgers*, and, *Lake*, and the provisions outlined in this document. If the assignment meets the above criteria, an Assignee may submit a claim for:

- Eligible costs incurred by the *Assignor* before the effective date of a written assignment of rights to the Fund that have not yet been reimbursed to the Assignor as of the effective date of the assignment. The Fund cannot reimburse any costs that the Assignor incurs after the effective date of the assignment. (See *Lake*, Pp. 19-20.)
- Eligible costs incurred by the *Assignee* after the effective date of a written assignment of rights to the Fund, which are reimbursable to the Assignee only after the effective date of the assignment. If the Assignee incurs any costs before the effective date of the assignment, they cannot be reimbursed for such costs. This is consistent with on-behalf-of agreements where the express agreement must be in place before a person may incur costs “on behalf of” a claimant and receive reimbursement for the costs from the Fund. (See *Lake*, Pp. 19-20.)

## **REIMBURSEMENT RESTRICTIONS AND PROCEDURES**

*Lake* provides that the Assignee may submit a claim for eligible costs incurred by the Assignor before the assignment. The *Lake* order also recognizes the Board’s authority to restrict assignments of the Fund’s obligations made pursuant to a letter of commitment (LOC).

- An Assignee essentially steps into the shoes of an Assignor, and with respect to cases where the Assignor has an existing Fund claim, the Assignee pursues the claim as of the effective date of the assignment. In cases where the Assignor has an existing claim and an LOC has been issued, the name on the LOC will be amended to that of the Assignee after the Fund accepts the assignment and in accordance with the effective date specified in the written assignment. Once the name on the LOC is amended to the Assignee’s name, it will not be amended back to the Assignor’s name. In cases where the Assignor does not have an existing claim or has a claim but has not received an LOC before the effective date of the assignment, the initial LOC will be issued to the Assignee. Consistent with these restrictions, the Fund will only accept certain assignments for reimbursement of eligible costs incurred by the Assignor before the effective date of the assignment.

1. Eligible costs incurred by the Assignor before the assignment and which are submitted to the Fund by the Assignor before the assignment, but that are not reimbursed by the Fund before the effective date of the assignment. The Fund will reimburse either the Assignor or the Assignee for these costs, depending on the terms of the written assignment. The assignment should clearly indicate which party will be pursuing this category of costs, and when deciding this, the parties should consider the following. The date that the LOC is amended to reflect the Assignee's name will depend upon how the parties agree to pursue this category of costs. For example, if the parties agree that the Assignor will pursue reimbursement of these costs, then the name on the LOC will not be amended until: (a) those costs are reimbursed to the Assignor, (b) the Assignor waives the right to the costs, or (c) the parties come to an alternate written agreement regarding recovery of these costs. The parties must understand that the Fund will not be able to reimburse the Assignee for any costs it incurs after the assignment while the Assignor is still named on the LOC. If, on the other hand, the parties agree that the Assignee will pursue the costs described above, then the LOC can be amended to reflect the Assignee's name soon after the Fund accepts the assignment. The Assignee could then begin submitting costs it incurred after the effective date of the assignment, as well as those costs that the Assignee may agree to pursue for the Assignor.

2. Eligible costs incurred by the Assignor before the assignment, but that are not submitted to the Fund for reimbursement until after the effective date of the assignment. The Fund will reimburse these costs to the Assignee, but not the Assignor. As stated earlier, once the LOC is amended to reflect the Assignee's name, it will not be amended back to that of the Assignor's. If the Assignor submits costs after the LOC is amended, there is no vehicle to pay the Assignor because the Assignor's name is no longer reflected on the LOC. Leaving the Assignor's name on the LOC for an indefinite period of time would delay the Assignee's ability (indefinitely) to submit costs, which would most likely frustrate the purpose of the assignment. Instead of the Fund directly reimbursing the Assignor for these costs, the Assignor and Assignee may reach an agreement whereby the Assignee pursues these costs and ultimately pays them over to the Assignor.

- Assignments may not be used to circumvent priority. (*Lake*, p. 21.) A lower-priority claimant may not receive an assignment from a higher priority claimant, except to the extent permitted for "on behalf of" agreements. For example, if a Priority Class B claimant and a Priority Class D claimant or potential claimant are sharing in the costs of cleanup through a cost-sharing agreement and the Priority B claimant decides to assign its claim to the Priority D claimant or potential claimant, the Fund may conclude, consistent with *Hollis Rodgers*, that the Priority Class D claimant or potential claimant is attempting to circumvent the priority through the assignment.
- Claimant may not use an assignment to unravel the provisions of a previous release or indemnity agreement. (*Lake*, p. 21.) For example, a claimant sold the property in 1996

after the tanks had been removed and the buyer indemnified the claimant/seller for future corrective action costs and took over all responsibility for cleanup. In November 2000, the claimant/seller attempts to assign the claim to the buyer since the buyer is not eligible to file its own claim. In accordance with *Lake* and *Hollis Rodgers*, the assignment would not be acceptable. Once the buyer released the claimant/seller in 1996, the responsibility for cleanup shifted to the buyer. Between the parties, the claimant/seller had no responsibility for corrective action after the effective date of the indemnification and would not, therefore, have corrective action costs to assign to the buyer.

## SAMPLE PROVISIONS FOR ASSIGNMENTS

When entering into an Assignment of Reimbursement Rights (assignment) to the California Underground Storage Tank Cleanup Fund (Fund), both the Assignor and the Assignee should consider the limitations and restrictions that the Board established in *Lake* and the restrictions contained in the Fund's Guidance on Assignments. Sample provisions shown below comply with these restrictions. Parties are not required to use these sample provisions, but Parties are encouraged to review them to better understand the restrictions on assignments and to aid in the development of an assignment that will be acceptable to the Fund. Please note that the four options (shaded areas) listed under the "Recitals" portion, represent four different scenarios:

### ASSIGNMENT OF REIMBURSEMENT RIGHTS TO THE CALIFORNIA UNDERGROUND STORAGE TANK CLEANUP FUND

This Assignment Agreement is entered into this \_\_\_\_ day of \_\_\_\_\_, 200\_\_, between \_\_\_\_\_, (hereinafter referred to as "Assignor"), and \_\_\_\_\_, (hereinafter referred to as "Assignee"). This Assignment Agreement is intended to be in compliance with the terms specified in the Board Order entitled *In the Matter of the Petition of Lake Publishing Company*, Order WQ 2000-06-UST.

*[Parties must decide on effective date of the assignment.]*

This Assignment Agreement entered into on the above is effective on said date.

**OR**

This Assignment Agreement even though entered on the above date shall not become effective until the date escrow closes.

**OR**

This Assignment Agreement shall become effective on \_\_\_\_\_.

**RECITALS:**

*[Scenario 1 - Assignor already has an eligible claim filed with the Fund and the subject site is not being transferred to the Assignee or any other person]*

A. WHEREAS, Assignor is an eligible claimant for reimbursement from the Underground Storage Tank Cleanup Fund established by the Barry Keene Underground Storage Tank Cleanup Trust Fund Act of 1989 (Fund), for costs related to cleanup activities at the site located at \_\_\_\_\_, California. Assignor's Fund claim no. is \_\_\_\_\_.

**OR**

*[Scenario 2 - Assignor has an eligible claim filed with the Fund and is also transferring the subject site to Assignee]*

A. WHEREAS, Assignor is an eligible claimant for reimbursement from the Underground Storage Tank Cleanup Fund established by the Barry Keene Underground Storage Tank Cleanup Trust Fund Act of 1989 (Fund), for costs related to cleanup activities at the site located at \_\_\_\_\_, California. Assignor's Fund claim no. is \_\_\_\_\_.

WHEREAS, Assignor agreed to sell the site referenced above.

WHEREAS, on \_\_\_\_\_, Assignee agreed in the Purchase Agreement to buy the site referenced above from the Assignor. Purchase Agreement is attached as Exhibit A.

**OR**

*[Scenario 3 – Assignor does not have a claim filed with the Fund (but would be an eligible claimant) and is not transferring the subject site to Assignee or any other person].*

A. WHEREAS, Assignor would be an the eligible claimant for reimbursement from the Underground Storage Tank Cleanup Fund established by the Barry Keene Underground Storage Tank Cleanup Trust Fund Act of 1989 (Fund), for costs related to cleanup activities at the site located at \_\_\_\_\_, California. Even though Assignor would be an eligible claimant, Assignor has not filed a claim with the UST Cleanup Fund or established Fund eligibility for the subject site.

**OR**

*[Scenario 4 - Assignor does not have a claim filed with the Fund (but would be an eligible claimant) and is transferring the subject site to Assignee]*

A. WHEREAS, Assignor would be an eligible claimant for reimbursement from the Underground Storage Tank Cleanup Fund established by the Barry Keene Underground Storage Tank Cleanup Trust Fund Act of 1989 (Fund), for costs related to cleanup activities at the site located at \_\_\_\_\_, California. Even though Assignor would be an eligible claimant, Assignor has not filed a claim with the UST Cleanup Fund or established Fund eligibility for the subject site.

WHEREAS, Assignor agreed to sell the site referenced above.

WHEREAS, on \_\_\_\_\_, Assignee agreed in the Purchase Agreement to buy the site referenced above from the Assignor. Purchase Agreement is attached as Exhibit A.

And,

B. WHEREAS, Assignor desires to assign to Assignee rights to reimbursement from the Fund as described in more detail below, and Assignee desires and agrees to accept such assignment subject to the terms of this Assignment Agreement.

*[Parties: You should include any other recitals that apply to your situation.]*

## **AGREEMENT**

ACCORDINGLY, Assignor and Assignee hereby acknowledge that on the effective date of the Assignment Agreement, the Assignee steps into the shoes of the Assignor and agree as follows:

### **PART I**

*[In cases where the Assignor has an eligible claim filed with the Fund.]*

1. Assignment. Assignor assigns and transfers to Assignee, Assignor's rights to reimbursement of corrective action and regulatory technical assistance costs and third party compensation claims from the Fund under Claim No. \_\_\_\_\_ (Claim) for the site located at \_\_\_\_\_, California. In particular, the Assignor agrees to assign the following rights to reimbursement:

(A) The Letter of Commitment (LOC);

- (B) Costs that are incurred by Assignor before the effective date of the Assignment Agreement, but that are not submitted to the Fund for reimbursement until after the effective date of the Assignment Agreement.
- (C) Costs that are incurred by Assignor before the effective date of the Assignment Agreement and that were submitted by the Assignor before the effective date of the Assignment Agreement, but not reimbursed by the Fund before the effective date of the Assignment Agreement. *[Do not include this provision in your assignment if the Assignor will be pursuing this category of costs.]*
- (D) Costs incurred by Assignee after the effective date of the Assignment Agreement.

*[Parties: As explained in the Fund's Guidance on Assignments, the Fund will only accept an assignment that complies with certain restrictions. To be acceptable, the assignment must assign to the Assignee the items identified in A, B, and D above. The parties may agree that the Assignor will pursue the costs described in C above, but such an agreement must be clearly expressed in the assignment. If the Parties intend for the **Assignor** to pursue these costs, consider the following sample provision.]*

The Assignor submitted a reimbursement requests to the Fund before the effective date of this Assignment Agreement, but has not yet or does not expect to receive reimbursement before the effective date of this Assignment Agreement. The parties agree that the Assignor will pursue these costs and that any amounts determined eligible will be paid to the Assignor. The parties acknowledge that the LOC will not be amended to the Assignee until (1) the costs are paid to the Assignor; or (2) the Assignor waives its rights to this reimbursement; or (3) the parties reach an alternate agreement regarding these costs.

**OR**

*[In cases where the Assignor would be an eligible claimant, but the Assignor has not yet filed a claim with the Fund.]*

1. Assignment. Assignor has not filed a claim with the Fund for the site located at \_\_\_\_\_, California and hereby assigns and transfers to Assignee, any and all rights to reimbursement of eligible costs from the Fund that Assignor has or may have with respect to site located at \_\_\_\_\_, California. This includes the right to submit a claim application to the Fund and to pursue reimbursement under the claim. Assignee agrees to demonstrate Assignor's eligibility for the Fund and the priority class for which Assignor would qualify.

## PART II

*[Parties: B., C. and D., below, are not applicable to a case where the Assignor has not yet filed a claim with the Fund.]*

2. Rights of the Assignee to Receive Reimbursement of Corrective Action Costs Regulatory Technical Assistance Costs, and/or Third Party Compensation Claims Incurred After the Effective Date of the Assignment.

- A. Assignee acknowledges and agrees that the maximum amount allowed for reimbursement per occurrence is \$1,500,000, less the applicable level of financial responsibility.
- B. Assignee acknowledges and agrees that any reimbursement thus far paid to the Assignor will reduce the amount available per occurrence.
- C. Assignee acknowledges that should there be an overpayment issue surrounding past costs reimbursed to the Assignor, reimbursement due the Assignee will be reduced by the amount of the overpayment owed by the Assignor.
- D. Assignee acknowledges that should there be any outstanding issues surrounding past costs reimbursed to the Assignor, such as proof of payment, reimbursement due the Assignee will be reduced by the amount still outstanding or owed by the Assignor.
- E. When requested by the Fund, Assignee agrees to complete and execute the Non-Recovery From Other Sources Disclosure Certification ("Certification") for any funds received by the Assignor or the Assignee. The Certification requires disclosure of certain information associated with the unauthorized release and cleanup at the site, including information about any legal actions or insurance coverage that relates to the site. Assignee will be required to obtain such information from the Assignor in order to properly complete the Certification.
- F. Assignee acknowledges that if the Assignor or the Assignee has received funds from an outside source for costs that would otherwise be eligible for Fund reimbursement or receives money after the effective date of the Assignment Agreement for such costs, reimbursement due the Assignee will be reduced by the amount received by the Assignor and/or Assignee.
- G. Assignee shall comply with all applicable laws, regulations, terms contained in the Letter of Commitment and any other requirements that are a condition of payment for reimbursement from the Fund.



### PART III

*[Parties: The Fund requests that you include the following information in your assignment so that the Fund staff may contact you when reviewing the assignment. Please note, if the Assignee is a corporation, partnership or LLC, the individual authorized to enter into a binding agreement must also execute the assignment agreement. Please also provide the status of the individual authorized to sign, i.e., President, Vice President, Secretary, General Manager, etc.]*

3. Notice. Any notice, demand or document which any party is required or may desire to give, deliver or make to any other party shall be addressed as follows:

To Assignor: Name  
Address  
Telephone Number  
Fax Number  
Attorney Name/Address if applicable

To Assignee: Name  
Address  
Telephone Number  
Fax Number  
Attorney Name/Address if applicable

### PART IV

#### 4. Signature and/or Designation

**ASSIGNOR:**

**ASSIGNEE:**

Dated: \_\_\_\_\_

Dated: \_\_\_\_\_

\_\_\_\_\_  
Name

\_\_\_\_\_  
Name